BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GERARDO TORRES VILLARREAL	)	
Claimant	)	
	)	
VS.	)	
	)	
ONE SOURCE STAFFING & LABOR	)	
Respondent	)	Docket No. **1,050,674**
	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 6, 2010 Preliminary Decision entered by Administrative Law Judge Marcia L. Yates Roberts.

ISSUES

This is an appeal from a preliminary hearing. The respondent denied that claimant had suffered accidental injury arising out of and in the course of his employment and that he failed to provide timely notice of his alleged injury. The Administrative Law Judge (ALJ) found claimant sustained his burden of proof that his accidental injury arose out of and in the course of employment and that there was just cause for his failure to report the injury within 10 days. Consequently, the ALJ ordered respondent to pay for authorized medical treatment with Dr. Toby and temporary total disability compensation beginning June 29, 2010.

Respondent requests review of whether claimant's alleged accidental injury arose out of and in the course of employment with respondent and whether claimant provided timely notice. Respondent argues that contemporaneous medical records do not indicate an injury at work and instead support its medical expert's opinion that claimant's condition was caused by a pre-existing injury that had not healed. Respondent further argues claimant did not establish just cause for his failure to provide timely notice.

Claimant requests that the ALJ's Preliminary Decision be affirmed. Claimant argues that his pre-existing hand injury had healed and he suffered a new accident at work. Claimant further argues that he failed to provide notice of his accidental injury within 10 days because he feared it would jeopardize his chance at permanent employment.

The issues for determination on appeal from the Preliminary Decision are whether the claimant suffered accidental injury arising out of and in the course of his employment and whether he provided just cause for his failure to provide notice within the statutorily required 10 days after the date of the accidental injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

Initially, it should be noted that claimant had suffered a fracture to his right hand on October 12, 2009, before he went to work with respondent. He testified that he was helping a friend move a refrigerator when it fell on his hand. However, the contemporaneous medical records contain a history of injury to the hand in a fight. Claimant was treated at Truman Medical Center. Surgery was performed and pins were placed in the right hand. On November 20, 2009, the pins were removed. On December 11, 2009, claimant was told to wear a splint when using the hand and to not lift over 30 pounds. And claimant was instructed to return in a month for repeat x-rays in order to determine if he could return to full-duty work without use of the splint or weight restrictions. The follow-up appointment was not kept.

Claimant began working for One Source Staffing & Labor in January 2010. The employment agency assigned claimant to employment with Pratt Industries in Missouri. Claimant's job as a "Jumbo" machine operator helper involved loading, assembling, changing knives and cutter blades on a machine which manufactured boxes.

On April 23, 2010, claimant was feeding cardboard into the "Jumbo" machine when he allegedly smacked his right hand against the heavy duty steel rail on the machine. He continued working for approximately a week even though he testified his hand was swollen. Claimant sought medical treatment on April 29, 2010, at Truman Medical Center's emergency room due to complaints of pain and swelling. The initial triage form indicates claimant's chief complaint "Pt reports right hand swelling x1 week, denies injury but states approx a year ago he broke his hand in the same spot as the swelling."[1] X-rays of the right hand revealed subacute mid diaphyseal fourth metacarpal fracture with persistent fracture lucency and new posteromedial displacement as well as soft tissue swelling over the dorsum of the right hand. Claimant refused splinting and was advised to wear an ace wrap, elevate and apply ice, take ibuprofen for pain and follow up with an orthopedist at Hospital Hill Oral Surgery Clinic on May 4, 2010.

The claimant then advised respondent on May 4, 2010, that he had injured his hand at work and was sent to OHS Compcare (OHS) for a diagnosis. Dr. William Tiemann

[1] P.H. Trans., Cl. Ex. 1.

diagnosed claimant with a fracture of the right hand. The doctor opined claimant needed a surgical stabilization, a follow up with an orthopedist, and returned claimant to work with no work of the right hand. Respondent was not able to accommodate these light-duty restrictions and therefore started paying claimant temporary total disability compensation but such payments were discontinued on June 28, 2010.

At the request of respondent, claimant was referred to Dr. Anne Rosenthal for an independent medical examination. On July 20, 2010, claimant was examined and evaluated by Dr. Rosenthal. The doctor reviewed claimant's medical records and took a history. X-rays were obtained and revealed no evidence of acute trauma or ligamentous disruption. There was no evidence of soft tissue swelling. Dr. Rosenthal opined claimant's right metacarpal fracture was healed in an acceptable alignment. Dr. Rosenthal noted in pertinent part:

> I do want to point out in Mr. Villareal's own words to the Emergency Department on April 29, 2010, he "denies injury" but states approximately a year ago he broke his hand in the same spot as a "swelling". This is the closest history to his alleged event and he denied any recent injury but did note the history of injuring the hand approximately a year prior. It is only a week later that there is any mention of him striking his hand at work. His fracture is in the exact same location and Mr. Villareal was not complaint [sic] with treatment. In fact, he never showed up for reevaluation one month after his last visit on December 11, 2009. This fracture never healed between then and April, but now it is healed.[2]

Claimant testified he sought medical treatment on his own because he didn't want to get fired. And that he did not promptly report his injury because he was afraid that such injury would prevent his being hired by Pratt. Claimant disputes that he had initially injured his hand in a fight, stated that after treatment in December 2009 he was released to return to work in spite of what the medical records indicated and that he did not know why the emergency room record on April 29, 2010, indicated that he denied injury when he sought treatment for his hand.

Respondent argues that claimant failed to provide notice until 12 days after his alleged accidental injury and that there was no just cause for his failure to provide timely notice. This Board Member disagrees.

K.S.A. 44-520 states:

> Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the

[2] P.H. Trans., Cl. Ex. 3.

> employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

K.S.A. 2009 Supp. 60-206(a) states:

> In computing any period of time prescribed or allowed by this chapter, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday. "Legal holiday" includes any day designated as a holiday by the congress of the United States, or by the legislature of this state, or observed as a holiday by order of the supreme court. When an act is to be performed within any prescribed time under any law of this state, or any rule or regulation lawfully promulgated thereunder, and the method for computing such time is not otherwise specifically provided, the method prescribed herein shall apply.[3]

Claimant alleged a discrete trauma at work on April 23, 2010. Respondent was provided notice on May 4, 2010. Excluding intervening Saturdays and Sundays, claimant gave timely notice seven days after his alleged accident. Consequently, the ALJ's finding that claimant had just cause is modified to reflect that claimant provided timely notice within 10 days after the alleged date of accident.

Respondent next argues that claimant failed to meet his burden of proof that he suffered accidental injury arising out of and in the course of his employment.

The claimant's credibility is suspect due to his repeated denials regarding the contemporaneous medical records. As previously noted, claimant testified he initially broke his right hand when a refrigerator fell on it. However, the contemporaneous medical records contained a history that claimant stated he was involved in a fight. When he last saw the doctor providing treatment for that injury the medical record reveals that he was released with a restriction of no lifting over 30 pounds and instructed to wear a brace while active and

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[3] See *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

using his hands. And claimant was instructed to return in a month for further x-rays to determine if the healing was complete. Claimant never explained why he did not return for that follow-up appointment other than he did not recall being told and instead testified that he had simply been released to return to work. But he stated he did wear a brace but not while working. This is inconsistent with his testimony that he was just released to return to work. Finally, when claimant sought treatment on April 29, 2010, he testified that he told the doctors that he had injured his hand at work and he could not explain why the contemporaneous medical record contained the report that he denied injury but had broken his hand in the same spot approximately a year before. In summation, the claimant's testimony is repeatedly contradicted by the contemporaneous medical records. Moreover, Dr. Rosenthal opined that claimant's initial fracture had never healed at the time of the alleged April incident and that the right hand fracture was not related to his work for respondent. Based upon the evidence compiled to date, this Board Member finds claimant has failed to meet his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[5]

WHEREFORE, it is the finding of this Board Member that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated August 6, 2010, is reversed.

IT IS SO ORDERED.

Dated this 29th day of October 2010.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Michael W. Downing, Attorney for Claimant
Samantha N. Benjamin-House, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge

[4] K.S.A. 44-534a.

[5] K.S.A. 2009 Supp. 44-555c(k).